IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 1070

GUIDO TRUCCO,

Petitioner,

vs.

ERIE RAILROAD COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA (WESTERN DISTRICT) AND BRIEF IN SUPPORT THEREOF.

EDWARD E. PETRILLO,
Counsel for Petitioner.

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ERIE RAILROAD COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA (WESTERN DISTRICT).

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petitioner, Guido Trucco, respectfully prays that a writ of certiorari issue to review the judgment of the Supreme Court of Pennsylvania, Western District, entered in this case, January 7, 1946.

Statement of Jurisdiction

The Jurisdiction of this Court is invoked under Sections 237 (b) and 240 (a) of the Judicial Code as amended by the Act of February 13, 1925, also Act of March 8, 1934, and revised rules of the Supreme Court of the United States adopted February 13, 1939, and amended March 25, 1940,

October 21, 1940, and May 26, 1941. This petition is filed within three months from the date of the judgment in accordance with the rules.

Statement of Matter Involved

The judgment of the Supreme Court of Pennsylvania sought to be reviewed affirmed the judgment of the Superior Court of the State of Pennsylvania, which held that the petitioner's only remedy in his case was under the Act of Congress known as the Federal Employers' Liability Act and not under the provisions of the Workmen's Compensation Act of the State of Pennsylvania.

Appellant was injured on the 15th day of September, 1941, when he twisted his foot on some scrap iron while performing the duties of a blacksmith's helper in a repair shop of the Erie Railroad Company located at Meadville, Pennsylvania. After a period of hospitalization he was found to be totally disabled by reason of such injury and at the present time is still totally disabled from performing any heavy work.

He filed a petition for compensation with the Workmen's Compensation Board, and the Referee, after hearing, allowed him compensation for total disability. In his findings of fact and conclusions of law the Referee also found that claimant was not engaged in Interstate Commerce at the time of said injury. The defendant company, appellee, took an appeal to the Workmen's Compensation Board, which also found that the petitioner was not engaged in interstate commerce at the time of his injury and affirmed the award of the Referee. A further appeal was then taken by the defendant company to the Court of Common Pleas of Crawford County, which reversed the findings of the Workmen's Compensation Board. The Superior Court and Supreme Court have sustained such conclusions.

Opinions Below

The decision of the Supreme Court of Pennsylvania, now sought to be reviewed is as follows:

Filed Jan. 7, 1946.

"Per CURIAM:

We have carefully considered the record in this case in the light of the argument made on behalf of appellant, but must agree with the Superior Court that the Amendment of August 11, 1939, c. 685 § 1, 53 Stat. 1404, 45 U. S. C. A. § 51, to the Federal Employer's Liability Act, is controlling and that the Pennsylvania Workmen's Compensation Act is inapplicable.

The judgment is affirmed for the reasons stated by the Superior Court in its opinion reported in 157 Pa. Superior Ct. 398, 43 A. 2d 626."

The Opinion of the Superior Court of Pennsylvania referred to in the Opinion of the Supreme Court of Pennsylvania is as follows:

"Opinion by RHODES, *J.*:

Claimant, on September 15, 1941, was employed by defendant at its blacksmith shop at Meadville, Pa. In this shop repair parts for defendant's locomotives were made. This was the principal type of work in that shop. Claimant was hired as a helper to one of the blacksmiths to assist in the making of such parts, and at the time of the alleged accident he was engaged in making "strap hangers" used as replacement parts for defendant's locomotives. Defendant is an interstate railroad, and its locomotives are necessarily used in the conduct of interstate commerce. Claimant had been similarly employed by defendant prior to 1935, and was reemployed on the day of the accident.

The referee found that claimant was totally disabled as a result of an accidental injury on September 15, 1941, while in the course of his employment with defend-

ant, and that he was engaged in intrastate commerce at the time of his accident. The Workmen's Compensation Board sustained the findings of fact, conclusions of law, and the award of the Referee. On appeal to the court of common pleas the award was reversed and judgment entered for defendant on the ground that claimant's remedy, if any, was under the Federal Employers' Liability Act, as amended by the Act of August 11, 1939, c. 685, § 1, 53. Stat. 1404, 45 U. S. C. A. § 51 et seq."

There is no dispute as to the nature of claimant's employment, and consequently the only question presented is whether claimant was engaged in interstate commerce as defined by the 1939 amendment; the question for decision is therefore one of law. *Scarborough* v. *Pennsylvania R. Co.*, 154 Pa. Superior Ct. 129, 130, 35 A. 2d 603 (accident subsequent to amendment of 1939); *Jordan* v. *Erie R. Co.*, 146 Pa. Superior Ct. 134, 136, 22 A. 2d 116 (accident prior to amendment of 1939). The amendment of 1939 reads as follows: "Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter." In *Scarborough* v. *Pennsylvania R. Co., supra,* 154 Pa. Superior Court 129, 35 A. 2d 603, this court had occasion to give consideration to the purpose and scope of the amendment. In that case we said that under the 1939 amendment it was no longer necessary that an employee to receive the benefits of the Federal Act be engaged at the time of his injury in interstate transportation or in work so closely related to it as to be practically part of it, and that the amendment covered an employee when any part of his

duties was in furtherance of interstate commerce. We held that claimant, whose regular and general employment was that of a signalman working on the main line of defendant's interstate railroad, although at the time of the accident he was employed in installing new lights on the platform roof of one of defendant's stations, was engaged in interstate commerce under the amendment of 1939.

Speaking of the purpose of the amendment of 1939, it was said in *Ermin* v. *Pennsylvania R. Co.*, 36 F. Supp. 939, at page 940: "There are multitudinous decisions raising hair-splitting interpretations as to whether or not the employee at the time of his accident was actually engaged in interstate commerce. It was to avoid this difficulty that Congress enacted the amendment."

In the present case we think it clear that claimant was engaged in the furtherance of interstate commerce or in work affecting such commerce directly or closely and substantially. Claimant was engaged in the production of essential parts for the repair and maintenance of defendant's locomotives which were part of its facilities as a railroad operating an interstate commerce. An employee engaged in the repair or maintenance of interstate railroad facilities is within the present act. *Southern Pacific Co.* v. *Industrial Accident Commission et al.*, 120 P. 2d 880, 885; *Overstreet et al.* v. *North Shore Corp.*, 318 U. S. 125, 132, 63 S. Ct. 494, 87 L. Ed. 656, 663; *Moser* v. *Union Pacific R. Co.*, 147 P. 2d 336, 339.

In our opinion, this case comes within the exclusive operation of the Federal Employers' Liability Act, as amended. *Scarborough* v. *Pennsylvania R. Co., supra,* 154 Pa. Superior Ct. 129, 131, 35 A. 2d 603.

Judgment is affirmed."

Questions Presented

The questions involved are questions of jurisdiction:

1. Was the petitioner, a common, unskilled, backshop employee, *directly or closely and substantially* affecting the interstate or foreign commerce of appellee, or *did any part of his duties* further such interstate or foreign commerce?

2. To what extent did the Amendment of 1939 affect the original provisions of the Federal Employers' Liability Act?

3. In doubtful cases, such as the one at bar, should the jurisdiction of the State under the provisions of its Workmen's Compensation Laws be retained, or should it be surrendered in favor of a Federal Enactment?

I

Was the petitioner, a common, unskilled, backshop employee, directly or closely and substantially affecting the interstate or foreign commerce of appellee, or did any part of his duties further such interstate or foreign commerce?

The Federal Employers' Liability Act as amended, reads as follows:

> "Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of

kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purpose of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter." Apr. 22, 1908, c. 149, Sec. 1, 35 Stat. 65; Aug. 11, 1939, c. 685, Sec. 1, 53 Stat. 1404, Title 45 U. S. C. A. Sec. 51

The second paragraph of the foregoing citation constitutes the amendment of August 11, 1939.

The facts in this case are not in dispute. Appellant was employed in one of the shops of the Erie Railroad Company located in Meadville, Pennsylvania, where various heavy and light forgings and castings were manufactured. No repairs are directly made on the rolling stock of the defendant company in this particular shop. As part of the production or manufacturing shop in Meadville, a blacksmith shop is operated and it was in this shop that the accident occurred. On the day of the injury the blacksmith was engaged in forging some strap hangers. When these strap hangers had been forged they were to be forwarded to a machine shop to be finished, and then the finished product would be shipped to the Hornell Erection Shop where they were then to be stored and eventually used on locomotives. Appellant's duties were confined to the carrying of the lot metal from the furnace to the hammer die and to do other general work around the shop. He was just a common,

ordinary, unskilled workman, and could only be classified as a backshop employee having no contact whatsoever with the rolling facilities of the defendant company, or with the direct forgings of any parts to be attached to the rolling stock of the defendant company.

Under the provisions of the Federal Employers' Liability Act, prior to the amendment of 1939, as interpreted by this Honorable Court he could not be considered to be engaged in interstate commerce, and, therefore, his remedy would be under the Workmen's Compensation Laws of the State of Pennsylvania.

In *Shanks* v. *Delaware, Lackawanna & Western R. R. Co.* U. S. Reports—239 page 556, this Court in that case decided "that to recover under the Federal Employers' Liability Act, not only must the carrier be engaged in interstate commerce at the time of the injury, but also the person injured must be employed by the carrier in such commerce."

"Where a railroad company, which is engaged in both interstate and intrastate transportation, conducts a machine shop for repairing locomotives used in such transportation, an employee is not engaged in interstate commerce while taking down and putting up fixtures in such machine shop, and cannot, if injured while so doing, maintain an action under the Federal Employers' Liability Act, even though on the other occasions his employment relates to interstate commerce."

In the case of *Chicago & E. I. R. Co.* v. *Industrial Commission of Illinois, et al.*, 284 U. S. 296, this Honorable Court held that "an employee injured while oiling electric motor furnishing power for hoisting coal into chute, to be taken therefrom and used by locomotives principally employed in moving interstate freight, was not engaged in interstate commerce."

In the case of *New York, N. H. & H. R. Co.* v. *Bezue*, 284 U. S. 415, this Honorable Court again held that "unskilled roundhouse laborer injured while working on locomotive removed from service for 12 days for boiler wash and repairs was not engaged in interstate commerce."

In this particular case Mr. Justice Roberts in delivering the opinion of the Court, stated "the test thus applied is broader than our decisions justify. All work performed in railroad employment may, in a sense, be said to be necessary to the operation of the road. The business could not be conducted without repair shop employees, clerks, janitors, mechanics, and those who operate all manner of appliances not directly or intimately concerned with interstate transportation as such, or with facilities actually used therein. But we have held that the mere fact of employment does not bring such employees within the act."

To the same general effect were the decisions in the cases of *Chicago & East Ill. R. Co.* v. *Ind. Commission of Ill.*, 284 U. S. 296; *Chicago B. & Q. R. Co.* v. *Harrington*, 241 U. S. 177; *D. L. and W. R. R.* v. *Yurkonis*, 238 U. S. 439; *Chicago & N. W. Ry. Co.* v. *Bolle*, 284 U. S. 59.

II

To what extent did the Amendment of 1939 affect the original provisions of the Federal Employers' Liability Act?

It is claimant's contention that the Amendment of 1939 apparently contemplates two separate and distinct classes of railroad employees, namely:

First: those employees who, because of the nature of their duties, were regularly employed in the furtherance of the interstate commerce of their employer, but who, at the time of the accident, became temporarily divorced from

their regular duties so that at that particular time they were not engaged in the interstate operations of their employer; and,

Second: those employees whose duties constantly kept them either *directly*, or *closely* and *substantially*, in contact with the interstate commerce of their employer.

Therefore it would appear that the intent of the legislators, with reference to this first class, was to extend the benefit of the Act to those employees whose regular duties were part of the interstate operations of their employer, but who, at the time of the accident, divorced themselves from such interstate commerce because of some temporary different assignment not directly connected with their regular duties and the interstate business of the employer.

With regard to the second class, claimant contends that the legislators apparently intended to include within the benefits of the Act only such employees who were directly, or closely and substantially, affecting the interstate commerce of the employer.

As a result of such position, it would seem to logically follow that there exists an unconsidered third class which is not protected by, or affected by, the Amendment of 1939. This third class, whose members cannot be definitely ascertained, and whose membership must depend upon the facts of each individual case, apparently includes all those employees of a company engaged in interstate commerce, whose regular duties are such that they neither are employed in interstate commerce nor directly, or closely and substantially, affect the interstate commerce of the employer. Thus, there is an indistinct twilight zone in which this third group fits and in which each case must be delineated in the light cast by its own peculiar facts.

Claimant submits, therefore, that before any employee can be said to belong to the first two classes enumerated

above, it must be determined first of all whether any part of his *regular* duties did at one time or another further his employer's interstate commerce, and, at the time of the accident, he happened merely to be temporarily divorced from such regular duties; or, second, it must be determined that the employee involved was, at the time of his injury, either directly, or closely and substantially, affecting the interstate commerce of his employer.

Can it be said in our present case that the claimant, whose duties were so limited and restricted, comes within either of the above two classifications, and that he was doing such work that any part of his duties was in "furtherance of interstate or foreign commerce," or that he was directly, or closely and substantially, affecting such commerce?

It is respectfully submitted that in order to reach the conclusion that claimant comes within either of the first two classifications it would be necessary to stretch the provisions of the Act, and its Amendment, to such a point that it would include *all* railroad employees, without distinction as to the scope of their duties, for the reason that railroads generally embrace many activities assisting interstate commerce whether such railroads are directly connected with it or not. This view is similarly set forth by Mr. Justice Black in the case of *New York, N. H. & H. R. Co.* v. *Bezue* (284 U. S. 415, *supra*), wherein he said: "all work performed in railroad employment may, in a sense, be said to be necessary to the operation of the road. The business could not be conducted without repair shop employees, clerks, janitors, mechanics, and those who operate all manner of appliances not directly or intimately concerned with interstate transportation as such, or with facilities actually used therein. But we have held that the mere fact of employment does not bring such employees within the Act."

Counsel for claimant, Guido Trucco, contends that even if the Court is of the opinion that said claimant had *some* connection with interstate commerce at the time of the accident by reason of the type of work in which he was engaged, nevertheless such connection would be too remote to bring him within the intent of the legislators as set forth in the 1939 Amendment.

III

In doubtful cases, such as the one at bar, should the jurisdiction of the State under the provisions of its Workmen's Compensation Laws be retained, or should it be surrendered in favor of a Federal Enactment?

The Workmen's Compensation Act of the Commonwealth of Pennsylvania provides that "in every contract of hiring made after December 31, 1915 and in every contract of hiring renewed or extended by mutual consent, expressed or implied, after said date, it shall be conclusively presumed that the parties have accepted the provisions of Article 3 of this Act and have agreed to be bound thereby," etc. (Act of June 2, 1915, P. L. 739 as amended June 21, 1939).

Article 3 defines the term "injury" and "personal injury" and further provides "that it shall include all injuries sustained while the employee is actually engaged in the furtherance of the business or affairs of the employer, whether upon the employer's premises or elsewhere, and shall include all injuries caused by the condition of the premises or by the operation of the employer's business or affairs thereon, sustained by the employee, who, though not so engaged is injured by the premises occupied by or under the control of the employer or upon the employer's business or affairs are being carried on and the employee's presence thereon being required by the nature of his employment."

Under the provisions of this Act, claimant was awarded compensation by the Referee, which award was sustained by the Board. The question now is whether or not the jurisdiction of the State Workmen's Compensation Law should be surrendered in favor of the Federal Enactment. Both Acts were passed for the "benefit" of the employee and it was intended that the employee would obtain redress for his injury in either one of those two courts. At no time was it intended to deprive an injured employee of compensation because of the conflict of interpretations of those laws which were passed for the specific purpose of protecting him. We respectfully submit that in this particular case the jurisdiction of State Courts and tribunals should be surrendered only where lack of jurisdiction is shown to exist and that any doubt should be resolved in favor of petitioner's necessity to obtain compensation for his injuries. Unless petitioner is given the benefit of such doubt he will be left without any relief whatsoever either under State or Federal Statutes. Such a situation would be directly contrary to the specific intent of the legislators both in Pennsylvania and in the Congress of the United States, whose principal thought was to confer the benefit of such legislation to each employee so that he could receive some redress for his injury, either in the State Courts or Federal Courts.

We have been very much impressed by the decision of this Honorable Court in the case of "Davis v. Department of Labor and Industries of Washington," decided December 14, 1942, which appears in 63 Supreme Court Reporter, page 225 (317 U. S. 249).

While this case involves the construction and application of the Federal Longshoremen's and Harbor Workers' Compensation Act and amendments, yet the reasoning and logic of the opinion seems applicable to our present litiga-

tion. Mr. Justice Black, in delivering the majority opinion of the Court, stated "there is, in the light of the cases referred to, clearly a twilight zone in which the employees must have their rights determined case by case, and in which particular facts and circumstances are vital elements. That zone includes persons such as the decedent who are, as a matter of actual administration, in fact protected under the State Compensation Act."

Referring to the Jensen decision (*Southern Pacific* v. *Jensen*, 244 U. S. 205), Mr. Justice Black mentioned the Act of Congress passed on October 6, 1917, and the other efforts of Congress to protect employees so that their rights and remedies would be covered under the Workmen's Compensation Law of any State. Apparently Congress was always anxious to permit State Compensation protection whenever possible by making the Federal law applicable only "if recovery for the disability or death through Workmen's Compensation proceedings may not validly be provided by State law." Further on (on page 230) Mr. Justice Black stated, "the benefit of a presumption is also given in cases of conflict of state or state and territorial workmen's compensation acts under the Full Faith and Credit clause, Const. art. 4, paragraph 1. There, as here, the issue is a factual one arising from a clash of interest of two jurisdictions. In such a case involving the question of whether the California or the Alaska Workmen's Compensation Act should apply to a resident of California injured in Alaska who brought suit in California, this Court has said 'the enactment of the present statute of California was within State power and infringes no constitutional provision. *Prima facie*, every state is entitled to enforce in its own courts its own statutes, lawfully enacted.'"

Mr. Justice Frankfurter in concurring with Mr. Justice Black, in his opinion that, "Any legislative scheme that

compensates workmen or their families for industrial mishaps should be capable of simple and dependable enforcement." He goes on to add: "Such a desirable end cannot now be achieved merely by judicial repudiation of the Jensen doctrine. Too much has happened in the twenty-five years since that ill-starred decision. Federal and state enactments have so accommodated themselves to the complexity and confusion introduced by the Jensen rulings that the resources of adjudication can no longer bring relief from the difficulties which the judicial process itself brought into being. Therefore, until Congress sees fit to attempt another comprehensive solution of the problem, this Court can do no more than bring some order out of the remaining judicial chaos as marginal situations come before us."

These comprehensive statements are precisely the position now taken by Petitioner herein.

Reasons for Allowance of Writ

The question decided by the Supreme Court of the Commonwealth of Pennsylvania involves the interpretation of the Federal Employers Liability Act as amended by the Act of Congress of August 11, 1939, which question has not heretofore been determined by this Honorable Court. In addition thereto, it is the humble opinion of counsel for the petitioner that the Supreme Court of the State of Pennsylvania has decided the question in a way probably not in accord with applicable decision of this Honorable Court.

Conclusion

We respectfully submit that this is a case eminently proper for this Honorable Court to review.

Wherefore your petitioner respectfully prays that a Writ of Certiorari be issued out of and under the seal of this Honorable Court, directed to the Supreme Court of the

State of Pennsylvania, commanding that Court to certify and to send to this Court for its review a full and complete transcript of the record and all proceedings in said suit, being the case numbered and entitled in its docket as "Guido Trucco, Appellant, v. Erie Railroad Company, Appellee, 219 January Term, 1945", and that the judgment of said Court be reviewed by this Court, and for such other relief as to this Court may seem proper.

GUIDO TRUCCO,
Petitioner;
EDWARD E. PETRILLO,
Counsel for Petitioner.

(4005)

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CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1945

No. 1070

GUIDO TRUCCO,
Petitioner,

vs.

ERIE RAILROAD COMPANY

BRIEF OF RESPONDENT IN ANSWER TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

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ARGUMENT

The Workmen's Compensation Board of Pennsylvania decided this case solely on the theory that the 1939 amendment to the Federal Employers' Liability Act was unconstitutional (R. 29, 30). No suggestion was made by that Board that the petitioner's claim did not fall within the provisions of the 1939 amendment. On appeal to the Court of Common Pleas of Crawford County, that Court held that the 1939 amendment to the Federal Employers' Liability Act was not unconstitutional and that the petitioner was engaged in both intrastate and interstate commerce, with the interstate feature predominating. On the hearing before the Superior Court of Pennsylvania, the petitioner conceded the constitutionality of the 1939 amendment by withdrawing that question from the consideration of the Court. The question of constitutionality was not raised in the Supreme Court of Pennsylvania, nor is it raised in the petition in this Court.

The issue, therefore, is as to whether or not the employment of the petitioner falls under the provisions of the Federal Employers' Liability Act, as amended, which reads as follows:

> "Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any

foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

"Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter. Apr. 22, 1908, c. 149, Sec. 1, 35 Stat. 65; Aug. 11, 1939, c. 685, Sec. 1, 53 Stat. 1404, Title 45 U. S. C. A. Sec. 51."

The second paragraph of the foregoing citation constitutes the amendment of August 11, 1939.

The facts in this case are not in dispute. The business of the Erie Railroad Company is that of an interstate carrier operating through the States of New Jersey, New York, Pennsylvania, Ohio, Indiana, and Illinois, by means of the usual railroad equipment and maintenance shops at

different points on the line for the purpose of maintaining the cars, locomotives and equipment necessary and essential to the operation of its business. One of these shops is located in Meadville, Pennsylvania, where its produces various heavy and light forgings and castings for the maintenance and repair of its rolling stock, consisting of locomotives, cars and other equipment. In Hornell, New York, it maintains an erection shop where the necessary repairs are made on the rolling stock, and at other points on the line and at its terminal points, emergency repairs are made under the supervision of the Hornell erection shop. (R. 18) As a part of the production shop in Meadville, a blacksmith shop is operated and it was in this shop that the alleged accident to the petitioner occurred. On the day of the alleged injury, the blacksmith shop was engaged in the production of strap hangers and dress tender truck hangers to be used in repairing the locomotives and locomotive tenders of the railroad company. These strap hangers and other parts, when produced in the blacksmith shop in Meadville, were shipped to the Hornell erection shop, where they were used for the repair of locomotives and locomotive tenders. Their production in the Meadville shop, and their application to the rolling stock in the Hornell erection shop were essential to the repair and maintenance of interstate facilities, and it is submitted that the workmen who were engaged in their manufacture and production come under the exclusive jurisdiction of the Federal Employers' Liability Act.

Interstate Commerce

The definition of interstate commerce has in recent years been greatly enlarged and extended, and the old-

fashioned, narrow and strict interpretation is no longer recognized by the courts, nor by the Congress. Formerly, manufacturing was not a part of interstate commerce. More than two years before the enactment of the 1939 amendment to the Federal Employers' Liability Act, the Supreme Court of the United States decided the case of the *National Labor Relations Board against Jones & Laughlin Steel Corporation*, 301 U. S. 1, 57 Sup. Ct. 615, as well as many other cases, wherein it held that the persons engaged in the manufacture of commodities as employees of a company which had plants and warehouses in various states, to which the manufactured articles were shipped for assembly and sale, were engaged in employment which affected interstate commerce. Jones & Laughlin was a purely private enterprise. The respondents in this case is a common carrier actually engaged in interstate business, having shops and repair points in the several states, the maintenance and operation of which are essential to the definitely interstate business in which it is engaged, and certainly the employee of this interstate carrier, who is engaged in the manufacture and production of essential repair and maintenance parts of the interstate facilities of his employer, is engaged in an employment that affects interstate commerce.

The test under the National Labor Relations Act interpreted in the Jones & Laughlin Steel Corporation case, *supra*, as well as under the Federal Employers' Liability Act, is as to whether the employment affects interstate commerce.

Argument

Scope of the Federal Employers' Liability Act and the 1939 Amendment

Prior to the enactment of the 1939 amendment to the Federal Employers' Liability Act, the question as to whether or not "transportation" was involved played a prominent part in most of the decisions. Since the amendment, the question of transportation has ceased to be an important element in determining the nature and character of the employment. The purpose of the 1939 amendment was to broaden and liberalize the Act so as to bring within its provisions practically all of the employees of an interstate carrier.

In adjudications under the original Act there had arisen a legal twilight zone. It was that twilight zone that had created chaos and uncertainty and it was to eliminate that twilight zone that Congress enacted the 1939 amendment. Since its enactment, there has been no twilight zone and practically every employee of an interstate carrier is now afforded the benefits and advantages of the Federal Employers' Liability Act, and through that Act, is provided a remedy which is exclusive.

The purpose of the amendment was well stated by the Kansas Supreme Court in *Peggue v. Baldwin*, 121 Pac. 2d. 183, wherein it was held "the purpose of the amendment was to extend the provisions of the Act to cover all of the carrier's employees whose work though not in actual interstate transportation, or a part of it, furthered interstate commerce or in any way affected such commerce directly, closely and substantially." In that case, a workman shovelling cinders from a side track in the yards was held covered by the Federal Act.

Argument

In the case of *Patsaw v. Kansas City Southern Railway Company,* 56 F. Supp. 897, it was held that "the purpose of the 1939 amendment was to broaden and make it clear that if an employee is engaged in services, although by themselves intrastate in character, which in any way further or affect interstate commerce, he comes within the scope of this section."

Under the terms of the Act, it applies to any employee (a) "whose duties as such employee shall be the furtherance of interstate or foreign commerce" and (b) whose duties "shall in any way directly or closely and substantially affect such commerce". In the case at bar, the petitioner was engaged in the manufacture and production of necessary and essential repair parts for the repair and maintenance of the locomotives of the respondent, which were a part of, and were essential to, the interstate commerce being conducted by the employer, and any obstruction to, or interference with, this work that was being performed by the petitioner would be an obstruction of, and interference with, interstate commerce. It is accordingly true that the production of repair parts and their shipment in interstate commerce to the erection shops, (a necessary condition precedent to their application and installation as repairs to the locomotives of the respondent) directly affected the interstate commerce in which the respondent was engaged. It is a notorious fact that whenever the volume of business performed by interstate carriers, or their financial limitations have made it impossible for them to keep up the necessary repairs and properly maintain their equipment, interstate commerce has been seriously affected and the business of persons dependent upon that commerce has been seriously handicapped.

Argument

The Circuit Court of Appeals, Seventh Circuit, in the case of *Shelton v. Thomson,* 148 F. 2d. 1, interprets the 1939 amendment as follows:

"Appellant contends that plaintiff does not come within the protection of the Federal Employers' Liability Act. This Act was amended in 1939 to read:

'Any employee of a carrier, any part of whose duties as such employee shall be the *furtherance of interstate or foreign commerce;* or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter.' (Italics ours) 45 U. S. C. A. Sec. 51.

"Prior to its amendment the Act provided for the employer's liability to an employee for injury suffered only when the employee was engaged in 'such commerce' which phrase referred to 'commerce between any of the several States.'

"Appellant argues that plaintiff, employed in the railroad's storehouse, operating a crane which hoisted car wheels into position for repair on freight trains, some of which were used in intra- and others in interstate commerce, was not one who could conceivably be said to be engaged in interstate commerce.

"However, we have before us, for construction, the amended act, not the original section. There can be no doubt but that the amendment was intended to broaden the scope of the Act to include employees whose

work was related to the functioning of interstate commerce. Concededly the relationship between the encompassed occupations and the actual transportation in interstate commerce has become more tenuous as this law has developed. It was this fact, no doubt, that caused Congress to enlarge the scope of the Act by stating that all employments in 'furtherance of interstate * * * commerce' are within the Act. The word 'furtherance' is a comprehensive term. Its periphery may be vague, but admittedly it is both large and elastic. It would not be an undue stretching of it to hold that one who is engaged with others in the process of repairing the car so that it may thereafter be moved in interstate (or by happenstance in intrastate) commerce, is engaged in an occupation 'in furtherance' of interstate commerce.

"A car cannot travel even in interstate commerce without wheels. Ordinarily a car is as usable in interstate as in intrastate commerce. The same crane which plaintiff operated, moved many articles. Some were used on cars which moved in interstate commerce. No one in the employ knew where the car wheel would be used. Perhaps the success of the repair efforts would determine its future use.

"The report of the Senatorial Committee indicates that the amendment was intended to extend the application of the Federal Employers' Liability Act to employees, like plaintiff, who are engaged in work which left them and their attorneys in deepest doubt as to the law which governed their employers' liability and their right to recover damages for injuries which they might receive. The amendment was, we believe, a much

needed one—and the selection of the phrase 'furtherance of interstate * * * commerce' to accomplish the purpose of clarification, an effective and purposeful one."

ADJUDICATIONS UNDER THE 1939 AMENDMENT

In the case of *Ermin v. P. R. R.*, 36 F. Supp. 936, the Court said:

> "There are multitudinous decisions raising hair-splitting interpretations as to whether or not the employee at the time of his accident was actually engaged in interstate commerce. It was to avoid this difficulty that Congress enacted the amendment. It was, undoubtedly, the intent of Congress to include within the scope of the Federal Employers' Liability Act all employees, even those performing intrastate services whose employment meets the requirements of the Act. It is no longer subject to doubt that Congress had the power to include intrastate employment, which affects interstate commerce, within the scope of the Federal Employers' Liability Act."

In the case of *So. Pacific Co. vs. Industrial Comm.*, 120 Pac. 2d. 880, a car repairman was held to be included within the benefits of the amendment. In *Virginia Railway Co. vs. Early*, 130 Fed. 2d. 548, a machinist on his way to work at the time of the accident was held to be engaged in interstate commerce under the amendment. In *Lewis v. Industrial Commission*, 120 Pac. 2d. 886, the Court clearly points out the distinction between the law prior to the 1939 amendment and thereafter. There it was held that switching dead

cars for repairs was interstate commerce. In the companion case of *So. Pacific vs. Industrial Comm.*, 120 Pac. 2d. 888, the Court held that a freight car builder repairing freight cars, regardless of where the cars operated, was engaged in interstate commerce. In *Wright vs. New York Central*, 263 App. Div. 46, it was held that a boilermaker employed by the New York Central Railroad Company, even though hurt while performing intrastate work, was covered by the amendment. One of the latest cases adjudicating the effect of the 1939 amendment is the case of *Agostino vs. P. R. R.*, 50 F. Supp. 726. In this case the claimant was spreading ballast on a new stretch of track being built to eliminate curves, the new track not yet having been opened to interstate traffic. The Court in its opinion at page 729, says:

> "The weight of authority is to the effect that the amendment should be liberally construed so as to extend the protection of this Act to all employees, any part of whose duties further or affects interstate commerce 'in any way.' "

In the very recent case of *Harris v. Missouri Pac. R. Co.*, 149 P. 2d. 342, 158 Kan. 679, it was held that a railway employee injured while loading on a truck barrels containing oil to be used for filling lanterns and cans to oil employer's machinery, including engines used in interstate commerce, was engaged in furtherance of interstate commerce or work directly or closely and substantially affecting such commerce within this section, so that remedy for injury must be sought under this section and not under the Workmen's Compensation Act.

And in the recent case of *Zimmerman vs. Scandrett,* 57 F. Supp. 799, the Court, in its opinion, states the facts as follows:

> "The defendants are operating as a common carrier the railroad company's system which extends from Chicago and Milwaukee westward through various States to the Pacific Coast. The Milwaukee Shops, located in Milwaukee County, are an instrumentality or part of the system and consist of a group of twenty buildings. One of these buildings, known as Roundhouse No. 1, was used for the housing and repairing of locomotives utilized in interstate as well as intrastate commerce.
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> "Since July 14, 1920, and until his death on May 3, 1943, John Bangus was employed at the Milwaukee Shops. He was a member of a crew performing maintenance and repair work, such as the repairing of doors, windows and water leaks, digging sewers, and making sidewalks. While at work on the date last mentioned and engaged in repairing the door of Stall 9 of Roundhouse No. 1, he came into contact with a pipe containing shorted electric wiring and was instantly electrocuted,"

and thereupon the court holds that the 1939 amendment should be liberally construed so as to extend the protection of the Act to all employees any part of whose duties furthers or affects interstate commerce in any way, and that under the facts in the case the exclusive remedy was under the Federal Employers' Liability Act.

The Superior Court of Pennsylvania, in the case of *Scarborough v. P. R. R.,* 154 Pa. Superior Ct. 129, 35 A.

2d. 603, provides a comprehensive brief for consideration in the case at bar and the following is an excerpt from its opinion:

> "(8) Furthermore, we are of the opinion that the work claimant was doing at the moment of his injury 'directly or closely and substantially' affected the movement of interstate traffic. It is not necessary under the 1939 amendment that an employee to receive the benefits of the Federal Act be engaged at the time of his injury 'in * * * transportation * * * so closely related to it as to be practically part of it' as stated in Shanks v. D., L. & W. R. Co., supra (239 U. S. 556, 36 S. Ct. 189, 60 L. Ed. 436, L. R. A. 1916 C. 797).
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> "(9) It can hardly be said that the adequate lighting of the station is not closely and substantially related to, and does not affect the movement of, interstate transportation. Proper lighting certainly facilitates the handling of baggage and promotes the safety of persons using the trains, and may very reasonably be regarded as a contributing factor to the movement of interstate traffic. True, the lighting fixtures of a station are not instrumentalities that participate directly in the actual movement of transportation, a test applied prior to the 1939 amendment: Sullivan v. New York, N. H. & H. R. Co., supra. Nevertheless, from a practical standpoint they may be regarded as essential accessories to interstate passenger travel so that an employee making repairs thereto comes within the broadening language of the present statute reading 'any part of whose duties as such employee * * * in any way directly or closely and substantially, affect such commerce * * *'."

COMMENT ON PETITIONER'S BRIEF

The petitioner cites at great length cases which were decided prior to the 1939 amendment, none of which are applicable to the issues involved in this case. The 1939 amendment was designed to liberalize the Act so as to avoid a further continuation of the confusion which existed under the original act.

The petitioner on page 9 of his brief cites the case of *New York, N. H. & H. R. Co. vs. Bezue*, 284 U. S. 415, a case which was decided by this Court in 1932. The opinion in that case was written by Mr. Justice Roberts. Again on page 11 of his brief he cites the same case, erroneously attributing the opinion to Mr. Justice Black. In that case, the Court defines the nature of railroad employment and the essentiality of the work of all employees in the maintenance and conduct of interstate commerce in the following words:

> "All work performed in railroad employment may, in a sense, be said to be necessary to the operation of the road. The business cannot be conducted without repair shop employees, clerks, janitors, mechanics, and those who operate all manner of appliances not directly or intimately concerned with interstate transportation as such, or with facilities actually used therein."

In that case, decided before the 1939 amendment, the Court recognized the restricted provisions of the original act which limited its application to employment which involved transportation. The very purpose of the 1939 amendment was to eliminate such a restriction and to recognize that all railroad employment necessary to the conduct of interstate commerce was included under the Act.

Much reliance is placed by the petitioner on the case

of *Davis v. Department of Labor of Washington*, 317 U. S. 249, 63 Supreme Court Reporter 225. This is a case arising in the State of Washington under the Workmen's Compensation law of that state and involves the question as to whether the State Workmen's Compensation law or the Longshoremen's Act provided relief for the widow of a structural steel worker, who was drowned while working as an employee of a contractor engaged in dismantling an abandoned drawbridge. It involves an issue entirely foreign to the question arising in the case at bar. The background of the issue clearly appears from the following excerpt from the opinion of Mr. Justice Black:

> "With the manifest desire of removing this uncertainty so that workers whose duties were partly on land and partly on navigable waters might be compensated for injuries, Congress on October 6, 1917, five months after the Jensen decisions, passed an Act attempting to give such injured persons the 'rights and remedies under the workmen's compensation law of any State.' 40 Stat. 395, 28 U. S. C. A. Sections 41 (3), 371 (3). May 17, 1920, this Court declared the Act unconstitutional. Knickerbocker Ice Co. v. Stewart, 253 U. S. 149, 40 S. Ct. 438, 64 L. Ed. 834, 11 A. L. R. 1145. June 10, 1922, 42 Stat. 634, 28 U. S. C. A. Sections 41 (3), 371 (3), Congress made another effort to permit state compensation laws to protect these waterfront employees, but this second effort was also held invalid. State of Washington v. W. C. Dawson & Co., 264 U. S. 219, 58 S. Ct. 749, 82 L. Ed. 1111. March 4, 1927, came the Federal Longshoremen's and Harbor Workers' Act, 33 U. S. C. A. Section 901, et seq. Here again, however, Congress made clear its purpose to permit

state compensation protection whenever possible by making the federal law applicable only 'if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by State law.' "

There is no similarity between the questions of jurisdiction considered in the Davis case and the questions of jurisdiction involved in the case at bar. In that case, Congress itself was making persistent efforts to confer jurisdiction on workmen's compensation authorities and the issue was the constitutionality of that attempt. The Washington Supreme Court held that Congress had not constitutionally conferred this jurisdiction upon the compensation authorities of the State of Washington, and the Supreme Court of the United States reversed the case on the theory that the Congressional legislation was constitutional.

It is respectfully submitted that the 1939 amendment fully clarifies and extends the benefits of the Federal Employers' Liability Act so as to include within its provisions all of the essential maintenance and repair employees of an interstate carrier, and that there no longer remains the twilight zone, which, under the original act, was the source of so much confusion and litigation, and that the lower court interpretations hereinbefore cited are correct interpretations of the 1939 amendment and that they merit approval and acceptance by this Court.

Respectfully submitted,

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